No. 8122

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BERKELEY HALL SCHOOL, INC., RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

ROBERT H. JACKSON,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
LOUISE FOSTER,
Special Assistants to the Attorney General.

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OPINION BELOW

The only previous opinion in this case is the opinion of the Board of Tax Appeals (R. 14–32), which was reported in 31 B. T. A. 1116.

JURISDICTION

This petition for review involves income tax for the fiscal year ending June 30, 1925, in the amount of $12,021.99 (R. 15), and is taken from a decision of the Board of Tax Appeals entered January 31, 1935 (R. 32). The case is brought to this Court on a petition for review filed April 13, 1935 (R. 33–40), pursuant to the provisions of Sections 1001–

1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 286.

QUESTION PRESENTED

The taxpayer, a corporation operating a private school, was named beneficiary in a declaration of trust under which a tract of land was acquired and subdivided. Most of the lots were sold and the profits therefrom were paid by the trustee to the taxpayer and the former notified the Commissioner of Internal Revenue that in accordance with Section 704 (b) of the Revenue Act of 1928, it elected to have this income taxed to the beneficiary. The question is whether this money was taxable income in the hands of the taxpayer.

STATUTES INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 219 (a) The tax imposed by Parts I and II of this title, shall apply to the income of estates or of any kind of property held in trust, * * *
>
> (b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. * * *

Section 219 (a) and (b) of the Revenue Act of 1924, c. 234, 43 Stat. 253, contains the same provisions as those in the above section.

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 704. TAXABILITY OF TRUSTS AS CORPORATIONS—RETROACTIVE.
>
> * * * * *
>
> (b) For the purpose of the Revenue Act of 1926 and prior Revenue Acts, a trust shall, at the option of the trustee exercised within one year after the enactment of this Act, be considered as a trust the income of which is taxable (whether distributed or not) to the beneficiaries, and not as an association, if such trust (1) had a single trustee, and (2) was created and operated for the sole purpose of liquidating real property as a single venture (with such powers of administration as are incidental thereto, including the acquisition, improvement, conservation, division, and sale of such property), distributing the proceeds therefrom in due course to or for the benefit of the beneficiaries, and discharging indebtedness secured by the trust property, and (3) has not made a return for the taxable year as an association.

STATEMENT

The facts as found by the Board of Tax Appeals may be summarized as follows (R. 16–24):

The respondent was incorporated in 1920 under the laws of California as a private educational institution. Its stock since incorporation, has been owned in equal parts by the two Misses Cooper and Miss Stevens. The school was originally organized in 1911 by the former for the purpose of

training children and wards of Christian Scientists.

The school progressed from its inception but the organizers drew no salaries and used the small profits for the purchase of additional property for the school. In 1923, the net value of the property was about $12,000. Because of the lack of recreation facilities for the older children the respondent found, during that year, that it would be impossible to continue and was preparing to close the school and rent the buildings to provide its stockholders with income upon which to live.

When the parents of the children in the school became aware of this condition they called a meeting, at which the situation was discussed and ways of maintaining the school were considered. One plan suggested was to procure a loan for the respondent, upon a guarantee by the parents, of sufficient funds for it to acquire the necessary properties. Pursuant to this plan some of the parents signed a paper agreeing to guarantee a certain amount of money but the guarantee was not used because Mr. Gilchrist, one of the parents who was a prominent real estate operator, learned of a tract of land of 77.3 acres for sale in Beverly Hills. He was advised by the owner, the Rodeo Land & Water Company, that it would give an option to purchase the land for $462,180 payable in installments. A meeting of the parents was immediately called to consider this offer and it

was decided to accept it. Some of the parents advanced the sum of $10,000 which was required as a deposit to secure the option. This sum was later repaid to those who had advanced it and the receipt for such sum was taken in the name of the respondent. Immediately upon the signing of the option, the tract was subdivided into lots by Mr. Gilchrist who computed a sale price for each. These prices were determined by assigning to each lot a proportionate amount of the cost of the entire tract and of the estimated cost of subdivision. There was also added a proportionate amount of the sum necessary to pay for seven acres which were to be set aside as land for the school, plus $80,000 which was determined to be the amount needed for the erection of new buildings. When the prices were computed, the lots were offered for sale to the parents who subscribed for a large number.

The Bank of America of Los Angeles was requested to act as trustee for the purpose of taking title to the tract of land, executing the conveyances of the several lots, collecting the proceeds of sale and paying the development costs and the amounts due to the Rodeo Land & Water Company. Upon the Bank agreeing to act as trustee, the parents caused to be executed a deed of trust which designated the bank as trustee, the Rodeo Land & Water Company as the seller of the property and the respondent as beneficiary. The president of the re-

spondent signed the trust instrument at the request of the committee of the parents' organization which was handling the matter.

Before the title to the land was finally transferred to the trustee, it also received from Mr. Gilchrist, who was in charge of sales, executed contracts for the purchase of most all of the lots, and also cash representing down payments on such purchases in excess of the $100,000 required as the initial payment.

The Board found that the parents of the children in the school had no intention, in arranging for the acquisition of this land by the respondent, that the amounts voluntarily paid by them in excess of the cost of such lots should inure in any way to the personal benefit of the respondent and its stockholders. It was the intention of the parents that the profits accruing thereon should constitute a fund for the establishment and maintenance in perpetuity of a school for children at Beverly Hills to be operated under the influence of the Christian Science religion. The plan and purpose of the parents was understood and acquiesced in by the respondent and its stockholders. The respondent realized that the properties which would come into its hands as a result of these transactions would be received by it only for the establishment in perpetuity of a school of the character desired by the parents. The Bank of America recognized that the purpose of these transactions was

charitable and reduced its charge for acting as trustee to one-third of the usual amount.

The profit realized by the trustee from the sale of these lots in the taxable year 1925 was $111,-883.88. After payment of the purchase price of the land, cost of development, and the trustee's expenses, it paid over the funds in its hand to the respondent, which entered these upon its books in a separate account. The Board found that such funds were expended under a committee of the parents' organization in the erection of buildings on the seven acre tract. The trusteeship of the Bank of America was terminated in 1927 by the transfer of the title of this seven acre tract by quitclaim deed to the respondent as beneficiary of the trust.

After receiving the property, the respondent made an effort to secure the perpetuation of the fund in accordance with the desire and intention of the parents' organization. It offered the property to the Christian Science Church in Boston, Massachusetts, but this offer was refused. Steps were then taken to effect the same result through a permanent trustee, and pending the appointment of such trustee the property has been administered by a board of trustees upon which the three stockholders of the respondent have membership.

The Commissioner determined that the trust under which the Bank of America served as trustee was within the provisions of Section 704 (b) of the

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Revenue Act of 1928 and, inasmuch as such trustee filed its election under the provisions of that section to have the income taxed to its beneficiary, the Commissioner determined that a deficiency was due from the respondent because of the fund which was paid over to it by the trustee.

The Board found that the respondent was a corporation organized for profit and not exempt under Section 231 (6) of the Revenue Act of 1924, but held that the respondent received the funds in question as trustee for the purpose of perpetuating a school for the friends of Christian Science and that the money was not taxable income in the respondent's hands. Accordingly, it decided that no deficiency was due.

In contrast to the Board's findings, attention is called to the following facts taken from the statement of evidence (R. 42–149):

Mr. Swarzwald, one of the parents who testified, stated that there was not any special committee of the parents who worked on the plan here in question (R. 54), and that there was no formal organization of the parents but merely an informal group which had no legal status (R. 65–66).

The president of the respondent testified that she went to the Bank of America to arrange for it to act as trustee (R. 71); that she and her associates helped in every way they could to sell the lots (R. 84); that the checks for the improvements on the land were signed in the name of Berkeley Hall

School (R. 85); that the school checked out the money which went to the architect for the new buildings and also for other expenses on the buildings (R. 79, 88); that while the land was still held by the Bank of America, Berkeley Hall School took out a loan for the finishing of four of the new buildings and that she signed the papers for such loan (R. 86).

The declaration of trust (R. 103–123) covering the acquisition of the land here in question was signed by the president and secretary of the respondent, which is named as beneficiary therein. Among other things this declaration provides (1) that the initial payment of $100,000 on the purchase price of the land was paid by the beneficiary to the trustor; (2) that the resale of the land shall be on such terms as may be approved by the beneficiary; (3) that the beneficiary shall at all times pay all taxes and keep the property free from all liens or assessments by reason of improvements thereon; (4) that the beneficiary agrees to install water mains, gas mains, telephone, and electric poles to all parts of the devisee's premises; (5) and that the beneficiary is primarily responsible for all loans on such property and expenses of the trust including the payment of commissions to Mr. Gilchrist and the agents for sales of property. The declaration also provided that in the event the beneficiary should sell, assign, or transfer its interest in the trust, the assignees must agree to per-

form all of the obligations placed on the beneficiary by such declaration.

In an amendment to the trust (R. 144–145), it is provided that the beneficiary shall deposit a sum of $45,000 to be paid out to the contractor upon receipted bills O. K.'d by the beneficiary and such amendment was signed by the secretary and president of the beneficiary, which is the respondent here. In connection with this amendment there was handed to the trustee a check of Berkeley Hall School with a statement from Mr. Gilchrist who signed as "agent" of the Berkeley Hall School (R. 145).

SPECIFICATION OF ERRORS TO BE URGED

The petitioner's assignment of errors (R. 37–39) is incorporated herein fully by reference, but for convenience the assignments are summarized here as follows:

The Board of Tax Appeals erred in failing to find a deficiency in tax of $12,021.99 due from the taxpayer for the fiscal year 1925; in finding that the only consideration passing from the taxpayer for its receipt of the disputed funds and the real estate was the taxpayer's agreement to accept them in accordance with the plan of the parents to establish and maintain in perpetuity a school for children under the influence of the Christian Science faith; in holding that the taxpayer never treated the fund or property as its own, and did not receive either of them for use in its individual corporate

purposes; in holding that the taxpayer received the fund as trustee of a trust created for providing and perpetuating a school for children of students and friends of Christian Science.

SUMMARY OF ARGUMENT

The Board held that the school, which is the taxpayer here, is not exempt from taxation as it is a corporation organized for profit but that it is not taxable on the profit made from the sale of certain land as such funds came from parents interested in the school and must be treated as a trust fund for the perpetuation of the school.

The Board is in error in holding that such profit is not taxable in the school's hands. The land was purchased by the school and sold for it by the Bank of America acting as its trustee. The latter elected not to pay the tax on such profit as it had a right to do under Section 704 (b) of the Revenue Act of 1928, and as it paid the money over to the school, the latter is taxable. The parents were not in a position to and did not impress this money with a trust. They did not buy all of the lots, but even as to those they did buy, the lots which they got were valuable consideration for their money, so there can be no claim that a gift was made to the school. Moreover, there is nothing to show that either the school or the bank made any promise, oral or written, to the various purchasers that the profits would be treated as a trust fund. The contracts for sale of the lots and the deeds given therefor indi-

cate an outright purchase without any conditions attached. If this money could be treated as a trust fund, we would have the queer situation of the school acting both as trustee and as beneficiary. This cannot be denied, for all the witnesses admit that the profits were intended to be used for the benefit of the school and not for any other entity. Thus legal and equitable title would merge in the school and there would be no trust. Accordingly, under either view of the case, it must be seen that the profits belonged to the school and not being an exempt corporation it must pay the tax thereon.

ARGUMENT

The Board of Tax Appeals found that the school, which is the taxpayer here, is a corporation organized to operate a private school for profit. Accordingly, it held that the taxpayer was not exempt from taxation under Section 231 (6) of the Revenue Act of 1924.[1] The Board's finding was correct and we assume that it will now be admitted that the school was a corporation organized for profit during the taxable year 1925.

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[1] Sec. 231. The following organizations shall be exempt from taxation under this title—

* * * * *

(6) Corporations, and any community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual; * * *.

But the Board held that there was no deficiency due from the school on the ground that the net profit which was made on the resale of the land here involved came to the school as a trust fund created by the parents and so was not taxable income in the school's hands. We admit that if the money was paid in the first place by the purchasers of lots as a trust fund, it is exempt from tax, but we deny that this is so. Instead we submit that this is simply a case of the purchase and subsequent resale of land at a profit. Such profit was part of the purchase price paid by the parents and other purchasers but being paid by them without restriction and for valuable consideration, the money was not impressed with a trust and never became a trust fund. So having received the profit as proceeds of sale and not as a trust fund, the school is liable for tax as any other taxpayer would be for gain on a profitable sale.

This profit was paid to the school by the Bank of America acting as trustee in connection with the purchase and resale of the land. The trust under which the bank acted must not be confused with the trust which the Board found was created by the parents There can be no question about the existence of the former for its terms are set out in writing and state (R 103–123) that its purpose is (1) to insure the Rodeo Land & Water Company that the purchase price due from the school would be paid and (2) to facilitate the subdividing and

the sale of the lots on behalf of the school. The three parties involved are the Rodeo Land & Water Company, the bank, and the school acting as trustor, trustee, and beneficiary, respectively. Pursuant to this agreement, the purchase price was paid to the trustor, the costs of subdividing the land were paid and the net profits were turned over by the bank to the school. The bank then filed notice with the Commissioner that, in accordance with permission given in Section 704 (b) of the Revenue Act of 1928, *supra,* to trusts created to liquidate real property as a single venture, it would elect to have the income from such trust taxable to the school as beneficiary. Such notice indicates that the bank considered the profit which had been made taxable income but did not want to pay the tax itself. In accordance with this notice, the Commissioner determined that a tax on this amount was due from the school.

In holding otherwise, the Board stated, among other things, that the school was not a beneficiary within the above section, and indicated that the word is used in its ordinary sense. We agree that this word should be given its ordinary meaning, but we are unable to see why the school is not such a beneficiary. Black's Law Dictionary (3d ed.) defines beneficiary as one for whose benefit a trust is created, and this, we think, is the common meaning. The trust under which the land was acquired and sold was created for the benefit of the school

and the declaration of trust names the school as beneficiary, so there should be no question as to this. Indeed, it appears that the Board is not much concerned with this phase of the case, but considers as the controlling factor its finding that there was another or second trust, set up by the parents who desired that the purchase price of the lots in excess of cost be held as a trust fund for perpetuating the school. So the essential thing to consider here is not the status of the school, but the character of the money which it received. Was the money part of the selling price of the lots or was it a trust fund?

The basis for the Board's conclusion as to this second trust is that the parents made voluntary contributions and that the only consideration given by the school was its agreement to accept the contributions in accordance with the parents' plan, the purpose of which was to perpetuate the school (R. 27). We do not agree that there was a second trust, and at the outset want to call attention to the fact that these so-called contributions were not gifts, and that the Board is in error about the consideration furnished by the school.

As the parents who advanced the $10,000 needed to secure the option were all repaid, the only contribution made in money by any of them was the amounts paid for the lots which they purchased for their individual use. There were 375 lots sold (R.

126). We do not know how many were purchased by the parents but we do know some were sold to outsiders. We also know that the prices were determined before it was known who would buy them, and the method used by the experienced real estate man in charge was the same for all lots and the same as that used by any one who is seeking to realize a quick profit from a real estate venture. None of the prices were exorbitant and many ranged from $1,000 to $1,500 (R. 124–126). Accordingly, regardless of the motive which actuated the purchasers, they were receiving valuable lots in Beverly Hills in return for their money and so made no gift in making the purchase. Only one of the four parents who testified mentioned the returns but that one stated that he later sold one of his lots at a large profit (R. 58). From this we may infer that the venture also proved profitable to the parents and the others who got the lots.

So it must not only be admitted that the parents received valuable consideration for the money they spent but also that such consideration was furnished by the school or its trustee, the Bank of America, for there was no one else in a position to sell the lots. It may be that the parents could have bought the tract of 77 acres direct from the Rodeo Land & Water Company, but the fact is that they did not do so. There was an attempt made through all of the testimony to treat the school as a figure head but careful analysis of the evidence shows

that this is not the fact. The school's officers, or its agents, actually carried on the negotiations and either the school or the bank assumed all obligations ordinarily imposed by such dealings.

The idea of acquiring more land and buildings was not a new one. The school's president testified that the school had made three moves before this land was purchased and had constantly tried to secure more adequate facilities (R. 67–68, 78). When the parents learned of the difficulties the school was having, meetings were held and it was agreed by those present that they would act as guarantors of a loan if the school could secure one. But later it was decided that the better plan would be for the school to buy the tract of land here involved. It was figured out that a small part of the land could be set aside for the school and the rest could be subdivided and sold at a profit large enough to furnish money for new buildings. There is nothing novel about this plan as it has been adopted by many people desirous of making quick profits, and it is not unusual for a company or an individual to embark on such a venture with practically no money. Accordingly, we must not be misled by the fact that the school had very little funds to start with and had other purposes besides that of making a profit. Undoubtedly the venture was undertaken by the school for a profit, and the money which was made was just as much the school's as if it had been able to negotiate with the vendor direct and without help from the parents.

To understand the extent the school was actually involved in this undertaking, we must study the trust which was set up to handle the negotiations. The president of the school personally arranged for the Bank of America to act as trustee, and she and the secretary signed the Declaration of Trust (R. 103–123). This declaration states that the Rodeo Land & Water Company, as trustor, has agreed to sell and convey to the Berkeley Hall School a certain tract of land; that the initial payment of $100,000 has been paid by the school, that the trustee is to hold the land for resale and is to pay the profits, in excess of the purchase price and other costs allowed therein, to the school as beneficiary; that Mr. Gilchrist is to act as agent of the trustor and the beneficiary in subdividing the land and in installing improvements for a commission named therein; that the school is to be liable for all taxes and assessments and has agreed to install water and gas mains, and telephone and electric poles, and the right of the school to assign its interests is recognized but its assignee must assume the school's obligation thereunder. The parents were not involved in this trust. Instead, it is obviously a business proposition between the school and the other two parties, and the fact that the school assumed certain obligations for itself and got certain assignable interests without conditions being attached contradicts the idea of its being a figurehead. Moreover, when the money was received by

the school, it continued to take the responsibility and proceeded to spend the money for the new buildings and the facilities which it had needed (R. 78–79). When it was found that the profits from the land would not be enough, the school then borrowed additional funds, using its new assets as security (R. 86, 88). Thus it is apparent that the school was actually the owner of the property, not a trustee, and that it made the various expenditures in accordance with the plans which it had long had for the development of the school.

This is important because the Board's opinion indicates that the parents were in a position to and did attach certain conditions to the services they rendered which would cause net profits received from the lots to be impressed with a trust. The Board refers frequently to the parents' organization and also to a committee representing the parents, but these references are not supported by the facts. Mr. Swarzwald, who was one of the parents who offered his services, stated that he did not know of any special committee of the parents, that Mr. Gilchrist engineered the whole thing, and that the parents did not have any formal organization and had no legal status (R. 54, 65–66). The Board refers to Mr. Gilchrist as managing the subdividing but does not state that he was acting as agent for the school. However, it cannot be denied that he was the school's agent for he designated himself as agent in signing his name to

papers (R. 145), and the Declaration of Trust referred to him as agent (R. 107). Also, it was admitted that he was paid a commission as agent and that his real estate office sold the lots (R. 58). From this it is clear that outside of Mr. Gilchrist who was employed by the school to act as its agent, the chief, if not the only real, service rendered by the parents was their purchase of lots for which they got value received.

The Board appears to ignore the lots as consideration and indicates that the only consideration which the school gave in return for the money was its promise to use the money in accordance with the parents' wishes for perpetuating the school (R. 27). The Board states that it is this promise which caused the net profits to be a trust fund. However, the evidence does not show that there was a promise but does show that the lots came from the school's trustee.

To be effective as consideration, the promise should of course have been made to each purchaser but there is no evidence to show that any promise of this character was made to any purchaser. The contracts of purchase for the lots were very long and detailed and were signed by the bank as trustee for the school and by the purchaser (R. 127–136). Neither these contracts nor the deeds covering the lots (R. 136–143) contain any terms which would indicate that the purchase money was to be treated as a trust fund.

Moreover, none of the four parents who testified stated that the school had promised to hold the purchase money in trust. The school's president also testified but she did not indicate that either she or her associates had ever made any promises to the several purchasers as to the money. Instead, she stated that the selling of the lots was largely handled by others and indicated that she had little contact with the purchasers. From this it will be seen that there is no basis in the evidence for the Board's finding that such a promise was made and was consideration for the money paid to the school.

Thus it is apparent that instead of relying on evidence of actual promises, which might be treated as consideration for payment of the money to the school, the Board has been influenced by a number of indefinite statements by the witnesses as to what they expected the school to do or what they knew the school intended to do. These statements are, in substance, that the parents intended to give the land and money to the school and that such property was to be used to perpetuate the school (R. 51, 57). But as we have pointed out the plan as actually worked out did not result in gifts being made. Instead it resulted in purchases of a number of lots by the parents from the school. Such purchases of course helped the school to make a profit but this was not the same as making a gift to the school. The parents received value in return for

the money they paid out and got no definite or express promise as to how the purchase money would be used. Consequently they are not in a position to claim that they could force the school to use the funds in any particular way. In other words, after the lots were received by the purchasers, the contract relation came to an end and they had no rights which they could enforce against the school.

However, regardless of these facts, the taxpayer contends and the Board has found that there was a trust relation existing between the parents and the school. But we submit that this finding ignores well established principles of trust law. It is of course fundamental that the person who creates the trust must own the property which is to be the subject of the trust, for obviously one cannot grant that which does not belong to him. Bogert on Trusts and Trustees, Vol. 1, Sec. 44. So as to the seven acres of land which the school kept and which it now claims to have received in trust, there can be no question but that this is owned outright by the school. The parents at no time had either equitable or legal title to this tract and of course could not make it into trust property.

As to the money which the taxpayer also claims is a trust fund, we have already pointed out that this came to the taxpayer, or the school, as the purchase price for the lots it sold. Under these circumstances, it is apparent that the money was derived from ordinary sales and if this is not the fact the burden is on the school to show otherwise.

This is so because in tax cases the burden is on the one claiming the exemption. This is a heavy burden because exemptions are not to be lightly inferred and any well founded doubts are to be resolved against the one claiming the exemption. *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, 235; *Pacific Co.* v. *Johnson,* 285 U. S. 480, 491; *Trotter* v. *Tennessee,* 280 U. S. 354.

The burden is also on the school here to show that a trust was created by the parents because the existence of a trust will not be assumed in the absence of clear and convincing evidence. A trust as to personal property may be created by a parol agreement or may be implied from the acts of the parties, but in such case the evidence must be such as will admit of no other interpretation than that it was the intention to create a trust. *Trubey* v. *Pease,* 240 Ill. 513. This means that there must be evidence of acts or words of the trustor which will indicate with reasonable certainty that it was the intention of said trustor to create a trust, and the terms, purpose, and beneficiary of the trust must also be definitely proved. *Noble* v. *Learned,* 153 Cal. 245, 250; *Simpson* v. *Simpson,* 80 Cal. 237; *Burling* v. *Newlands,* 112 Cal. 476.

Here as we have already stated, if a trust fund was created, there was not merely one person or one group which acted as trustor but there were as many trustors as there were individual purchasers of lots. We do not know how many lots

were purchased by the parents and how many by outsiders. Moreover, there is not a scintilla of evidence in regard to what motives actuated the outsiders in buying the lots, and only four parents testified as to the lots which they purchased. At most, all that the testimony of the latter shows is that the parents who attended the meetings placed confidence in the school owners and expected them to use the money for new buildings and facilities. Merely reposing confidence in another does not of itself create a trust or make a trustee of the one in whom confidence has been reposed. *State* v. *State Journal Co.,* 75 Neb. 275. Thus we find that we know nothing of the intention of the majority of the purchasers and as to the parents who testified there was merely a showing of confidence placed in the school organization as it then existed, and the hope that it would use this money for the best interests of the school. We submit that this is far from proving that there was an intention to set up a trust fund and does not overcome the convincing evidence that the money came to the school unrestricted and in a regular business transaction.

The Board states that another reason for its conclusion is that the school did not treat this fund as its own or receive it "for use in its individual corporate purposes", but acted as trustee of the fund "for the purpose of providing and perpetuating a school for the children of students and friends

of Christian Science'' (R. 28). We think it is pertinent to ask what difference is there between ''the individual corporate purposes'' of the school and the purpose for which the Board thought this trust fund was created. Is it not too plain for argument that one of the purposes of the school from the beginning has been the perpetuation of a school for Christian Scientists. Also, how can it be said that such purpose was not ''an individual corporate purpose'', or that the amounts spent for new buildings, although larger, were any more for the perpetuation of the school than any of its current but necessary expenses. We submit that it is established by undisputable evidence that the school received this money and used it, not for any new or different purpose, but for one of the purposes which had existed since its establishment. We do not see how this can be denied in view of the testimony of the school's president that she and her associates, all during these years, had made a constant attempt to improve and increase the school's facilities; had moved the school three times before this land was acquired; were always thinking of ways by which they could raise money for the school and in some years had used all of the school's profits to pay interest on the mortgages and for more land (R. 67–69, 78). Moreover, in spite of some statements to the contrary, it is apparent that the school did accept the money as its own, assumed the responsibility for spending it,

and borrowed more money by using the property it got as security for the loan (R. 78–79, 86).

It may be true that the school's officers felt themselves bound to use the money for new buildings but this was actually no more than a moral obligation. But even if this were a legal limitation on the way in which the school could use the money, such limitations would not amount to the imposition of a trust and would not prevent the fund from being income to the school. Cf. *Standard Slag Co.* v. *Commissioner,* 63 F. (2d) 820 (App. D. C.); *Cleveland Ry. Co.* v. *Commissioner,* 36 F. (2d) 347 (C. C. A. 6th), certiorari denied, 281 U. S. 743. Moreover, the school's president admitted that since receiving the money, they had attempted to convey the school property to a permanent trustee but had not done so because they had had some difficulty in creating the trust (R. 80–81). Thus it appears that the parties themselves realize that until such trust is created, their obligations as to the new assets are merely moral and not legal.

There is a further important objection to the view taken by the Board. Even assuming that the purchasers intended to create a trust fund, there can be no trust as to this money for both the legal and equitable titles would be in the school and in such case no trust would come into existence. It is essential to the existence of any trust that there be a separation of the legal estate from the equitable enjoyment and no trust can exist when the same

person possesses both for when the two come together there is a merger and the trust ends. *Simpson* v. *Simpson, supra; In re Lamb,* 61 Cal. A. 321, 328; *In re Walkerly,* 108 Cal. 650; *Moras* v. *Cornell,* 49 R. I. 308, 315; *Wilson* v. *Harrold,* 288 Ill. 388; *Somers* v. *O'Brien,* 129 Kan. 24; 26 R. C. L. 1186; Perry on Trusts and Trustees (7th ed.), Vol. 1, Sec. 13.

An attempt may be made by the respondent to show that it was not the beneficiary of this so-called trust fund but the evidence will show otherwise. There are some vague statements as to the purpose of this money raising plan, but these cannot hide the fact that all who were interested were trying to help the school as it then existed, that they had nothing but praise for its management and desired nothing more than that it be allowed to continue as formerly but with improved facilities. Consequently, the plan for buying real estate was adopted to help the school perpetuate itself and the school received the money for its own benefit, and as rightful owner of the fund. In this respect, the instant case is obviously distinguishable from the line of cases in which cemetery lots are sold by the taxpayer who agrees to hold a portion of the purchase price as a trust fund to provide for perpetual care. As shown by the facts in *Portland Cremation Ass'n* v. *Commissioner,* 31 F. (2d) 843 (C. C. A. 9th), there is a definite agreement in those cases as to the trust fund and the beneficiaries are the pur-

chasers of the lots and have interests entirely distinct from the company which holds the fund as trustee. The situation is different here and the opinion of this Court in the *Portland* case indicates the weaknesses of the taxpayer's contention in the instant case that a trust fund was created.

Viewed in its entirety, it is apparent that this is simply a case of a private school adopting an ordinary real estate venture as a means of realizing a quick profit for use in carrying on its corporate purposes. That it was encouraged to embark on this venture by interested parents does not prevent the profit from being ordinary income in its hands and having failed to prove otherwise, we submit that the school is liable for income tax on such amount.

CONCLUSION

The decision of the Board is not supported by any substantial evidence and is contrary to well established principles of the law of trusts. Accordingly, its decision should be reversed.

Respectfully submitted.

ROBERT H. JACKSON,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
LOUISE FOSTER,
Special Assistants to the Attorney General.

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